IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14221 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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SHAIRABANU WD/O.GULAM MOHAMMAD HATHIWALA
- Petitioner

Versus

ABDUL HAMID AHMED HATHIWALA & 5 - Respondents

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Appearance :
MR ASPI M KAPADIA for Petitioner.
MR AJAY R MEHTA for Respondent Nos. 1-4.
MR ASHISH DAGLI for Respondent No. 6.

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CORAM :	HONOURABLE MR.JUSTICE K.A.PUJ

Date : 11/06/2007
ORAL JUDGMENT

1. The petitioner – original defendant No. 1 has filed this petition under Article 227 of the Constitution of India challenging the order dated 27.09.2004 passed by the learned Civil Judge (S.D.), Navsari below applications Exh. 249 & 254 in Special Civil Suit No. 108 of 1997.

2. This Court has issued notice on 27.10.2004 and interim relief in terms of para 7 (B) was granted whereby the impugned order dated 27.09.2004 was stayed. Rule was issued on 08.04.2005 and ad-interim relief granted earlier stood confirmed as interim relief. The Court has, however, observed that it would be open for the parties to move this Court if there is any settlement in the matter.

3. It is the case of the petitioner that the petitioner is the widow of the deceased Gulam Mohmed

Hathiwala who expired in Mumbai on 20.11.1996 on account of the ailment of brain tumor. The respondent No. 1 (original plaintiff) is the brother of the deceased Gulam Mohmed Hathiwala. The respondent Nos. 2, 3 & 4 – original Defendant Nos.3, 4 & 5 are sisters of the deceased Gulam Mohmed Hathiwala. The respondent No. 5 – original defendant No. 6 is the person who had purchased property described in para 3 (A) of the plaint from the petitioner.

4. It is also the case of the respondent No. 1 in the suit that the deceased Gulam Mohmed Hathiwala was the owner of the immovable properties mentioned in para 3 (A) and 3 (B) of the plaint being house situated at village Abhrama and a flat situated at Billimora respectively and that the deceased Gulam Mohmed Hathiwala was entitled to the provident fund and gratuity as mentioned in paragraph 3 (C) of the plaint. It is also the say of the respondent No.1 that the property described in paragraph 3 (A)

situated at Abhrama was purchased by his deceased brother i.e. deceased husband of the petitioner on 18.12.1983 and that the respondent No. 3 had contributed money towards making construction over the land purchased by the deceased. Property described in para 3 (B) of the plaint being flat at Billimora was also purchased by the deceased Gulam Mohmed Hathiwala in his name and that the respondent No. 1 had contributed money towards purchasing the same. It is also the case of the respondent No. 1 that according to Muslim Sheriyat law, he along with his sisters, i.e. Respondent Nos.2, 3 and 4 have a share in the aforesaid properties described in paragraphs 3 (A) and 3 (B) of the plaint and to the provident fund and gratuity as mentioned in paragraph 3 (C) of the plaint. The respondent No.1 in the prayer clause of the plaint had initially claimed 1/6th share in the aforesaid properties. However, by an amendment of the plaint, the respondent No. 1 deleted the figure 1/6th. The respondent No. 1 has claimed partition and separate possession of his share in the immovable properties

mentioned at paragraph 3 (A) and 3 (B) of the plaint and has claimed share of the amount of provident fund and gratuity as mentioned in paragraph 3 (C) of the plaint.

5. It is the case of the petitioner in the present petition that the petitioner being the widow of the deceased Gulam Mohmed Hathiwala was and is in possession and occupation of the immoveable properties mentioned in paragraph 3 (A) and 3 (B) of the plaint. On the death of Gulam Mohmed Hathiwala, the name of the respondent No. 1 was entered into the record of the rights as the owner of the said properties. The suit was filed by the respondent No. 1 on 24.10.1997 against the petitioner and the respondent Nos.2 to 6. Before the notice of the suit was issued upon the petitioner, the petitioner executed a sale deed dated 27.10.1997 in favour of the respondent No.5 (original defendant No. 6) in respect of the property mentioned in paragraph 3 (A) of the plaint situated at Abhrama. The Trial Court passed its judgment

dated 15.05.2001 in the suit and ordered preliminary decree to be drawn in accordance therewith. By the said judgment, the Trial Court allowed the respondent No.1's suit and observed that he is entitled to get ½ share in the properties situated at Abhrama and Billimora mentioned in paragraphs 3 (A) & (B) of the plaint. The Trial Court further observed that the respondent No. 1 is also entitled to get ½ share in the provident fund and gratuity amount of the deceased Gulam Mohmed Hathiwala. The Trial Court by the said judgment also set aside the sale deed dated 27.10.1997 executed by the petitioner in favour of the respondent No. 5 in respect of property mentioned in paragraph 3 (A) situated at Abhrama.

6. The record further reveals that the Trial Court after passing the preliminary decree appointed a Court Commissioner to make a report for partition of the properties mentioned in paragraphs 3 (A) and 3 (B) of the plaint. The Court Commissioner by his report

Exh. 247 stated that the properties situated at Abhrama and Billimora are not capable of partition and division. The respondent No. 1 along with respondent Nos. 2,3 & 4 made an application Exh.249 before the Trial Court stating that they be permitted to purchase over the 1/4th share of the petitioner in the properties in paragraphs 3 (A) and 3 (B) situated at Abhrama and Billimora.

7. The petitioner by her reply-cum-application Exh. 254 opposed the aforesaid application Exh. 249 and made an application to the Trial Court to permit her to purchase the share of respondent Nos. 1 to 4 in the aforesaid properties. The Trial Court by its impugned order has allowed the application Exh.249 and has dismissed the reply-cum-application Exh.254 of the petitioner and has permitted the respondent Nos. 1 to 4 to purchase over the share of the petitioner in the properties mentioned in paragraphs 3 (A) and 3 (B) of the plaint situated at Abhrama and Billimora.

8. It is this order which is under challenge in the present petition.

9. Heard Mr. Aspi M. Kapadia, learned advocate appearing for the petitioner and Mr. Ajay R. Mehta, learned advocate appearing for the respondent Nos.1 to 4. Despite service of notice, nobody appears on behalf of respondent No. 5. Mr. Ashish Dagli, learned advocate appears on behalf of respondent No. 6 – S.T. Corporation. The respondent Nos. 5 & 6 are formal parties in the present proceedings.

10. Mr. Aspi M. Kapadia, learned advocate appearing for the petitioner has submitted that the Trial Court has no authority and jurisdiction and has exceeded its jurisdiction in passing the impugned order. He has further submitted that the impugned order is contrary to the provisions of the Partitions Act, 1893. None of the provisions of the partition Act supports

the impugned order and enables the Court to pass an order. He has further submitted that though the petitioner by her reply-cum-application Exh. 254 had requested the Trial Court to permit her to purchase the properties mentioned in paragraphs 3 (A) and 3 (B) situated at Abhrama and Billimora, the Trial Court did not order the sale of the properties to the person who offered the highest bid and instead reasonably and arbitrarily permitted the respondent Nos. 1 to 4 to purchase and buy over the share of the petitioner in both the properties mentioned in paragraphs 3 (A) and 3 (B). He has further submitted that the Trial Court has not correctly appreciated that there were two immoveable properties and it would have been just, fair and equitable if the petitioner and the respondent Nos. 1 to 4 would have been permitted to purchase the share of the other in one property each. If the aforesaid method was adopted, there would have been equitable partition and distribution and the petitioner would also have got one property to herself. He has further submitted that the Trial

Court failed to appreciate that if the respondent Nos. 1 to 4 were permitted to purchase the 1/4th share of the petitioner, the properties would still remain undivided as between the respondent Nos. 1 to 4, complete partition of the properties could not be effected. As against that, if the petitioner were permitted to purchase the undivided share of the respondents, the properties would not remain undivided. He has, therefore, submitted that the order passed by the Trial Court requires interference by this Court while exercising the jurisdiction under Article 227 of the Constitution of India.

11. Mr. Ajay R. Mehta, learned advocate appearing for the respondent Nos. 1 to 4, on the other hand, relies on the affidavit-in-reply and strongly urged that the order passed by the Trial Court does not require any interference by this Court. He has further submitted that the Trial Court has passed preliminary decree in favour of the respondent No. 1 and by the judgment dated 15.02.2001, ordered partition of the properties

mentioned in the plaint and set aside the sale deed dated 27.10.1997. He has further submitted that by the said judgment and decree, the respondent No. 1 was declared as entitled to ½ share in the suit properties and also for ½ share in the Provident Fund and Gratuity amounts of deceased Gulam Mohmed Hathiwala. He has further submitted that the learned Trial Judge has also directed the petitioner in the said judgment to give appropriate share to the respondent No. 1 within two months from the date of the order and on failure, liberty was given to the respondent No. 1 to apply for appointment of Court Commissioner. Pursuant to this order, the Court Commissioner was appointed and report was submitted by the Court Commissioner in respect of two properties as well as the amount of Provident Fund and Gratuity. On the basis of this, he has submitted that the Trial Court has permitted the respondent No.1 to purchase the share of the petitioner. The Trial Court has also taken into consideration while passing the impugned order that the respondent No.1 has sold the property

at Abhrama and given the Billimora property on rent. The petitioner, therefore, did not require the property for herself as her residence and hence, there is no question of purchasing the share of the respondents by her. He has, therefore, submitted that no interference is called for in the impugned judgment and order passed by the Trial Court.

12. After having heard learned advocates appearing for the respective parties and after considering their pleadings and submissions made in the petition as well as in the affidavit-in-reply and after having gone through the impugned order passed by the Trial Court, the Court is of the view that the Trial Court's order does not require much interference save and except only to the extent that the respondent No. 1 is permitted to purchase the share of the petitioner only in one property and other property can be retained by her after purchasing the share of the respondents. Equity demands that the petitioner being the wife of the deceased is entitled to retain

atleast one property either for herself as residence or even for the purpose of making any income therefrom. Submission made by Mr. Kapadia to this extent appears to be just and proper and hence, without disturbing the order of the Trial Court, slight modification is made only to the extent that out of these two properties, one property shall be retained by the petitioner and the other property should be allowed to be purchased by the respondent No.1 and which property be retained by whom can be decided by the Trial Court, after hearing both the parties, while passing the final decree. While considering this issue, appropriate valuation by the Government Valuer should be made and as per the valuation, appropriate adjustment should be made and the either party shall give the share in terms of money to the remaining parties in respect of the property purchased by them. It is also clarified that as per the preliminary decree, shares determined by the Trial Court, both in respect of properties as well as amount of Provident Fund and Gratuity should be given effect to at the time of passing the final decree

in the suit which is pending with the Trial Court. This exercise of handing over the possession of the properties and giving up the shares of the remaining parties should be done as expeditiously as possible, preferably within a period of three months from the date of receipt of the writ or from the date of receipt of certified copy of this order, whichever is earlier.

13. Subject to the aforesaid directions and observations, this petition is accordingly disposed of as partly allowed. Rule is made absolute to the above extent without any order as to costs.

[K. A. PUJ, J.]

Savariya